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08 UNITED STATES DISTRICT COURT  
09 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

10 TERESA RAPISARDO, )  
11 Plaintiff, ) Case No. C05-0482-JCC-JPD  
12 v. )  
13 JO ANNE B. BARNHART, Commissioner ) REPORT AND RECOMMENDATION  
14 Social Security Administration, )  
15 Defendant. )  
\_\_\_\_\_ )

16 Plaintiff Teresa Rapisardo proceeds through counsel in her appeal of a final decision  
17 of the Commissioner of the Social Security Administration (the “Commissioner”). The  
18 Commissioner denied plaintiff’s applications for Disability Insurance Benefits (“DIB”) and  
19 Supplemental Security Income (“SSI”) under Titles II and XVI of the Social Security Act  
20 after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below,  
21 the Court recommends reversing the ALJ’s decision and remanding for further administrative  
22 proceedings.

23 I. FACTS AND PROCEDURAL HISTORY

24 Plaintiff is a thirty-five-year-old woman with a formal education through the eighth  
25 grade and some cosmetology training. AR 67, 82. She has work experience as a hair stylist,  
26

01 cashier, and library assistant. AR 544. Plaintiff last worked in October of 2000.<sup>1</sup> AR 73-74.

02 On February 26, 2001, plaintiff filed applications for DIB and SSI. AR 67-69, 479-  
03 80. Plaintiff alleged that fibromyalgia, carpal tunnel syndrome, depression, anxiety, panic  
04 disorder, agoraphobia, and suicidal ideation rendered her disabled as of December 27, 1998.<sup>2</sup>  
05 AR 67, 76. In her opening brief, plaintiff amended her alleged onset date to February 1,  
06 2001, the date after which she states she entered recovery from her heroin addiction. Dkt.  
07 No. 12. The Commissioner denied plaintiff's applications both initially and upon  
08 reconsideration. AR 39-42, 45-51.

09 Plaintiff requested an administrative hearing and on June 19, 2003, an ALJ issued a  
10 decision denying plaintiff's applications. AR 17-29. The ALJ found that, without the effects  
11 of her substance abuse, plaintiff's impairments did not meet any of the listings. AR 28. The  
12 ALJ found also that plaintiff was capable of performing certain types of sedentary work, such  
13 as "entry-level office clerk," and therefore found her not disabled for purposes of the Social  
14 Security Act. AR 29. The Appeals Council denied plaintiff's request for review, making the  
15 ALJ's June 19, 2003, decision the Commissioner's final decision for purposes of judicial  
16 review. AR 6-8.

17 On March 25, 2005, plaintiff timely filed this civil action seeking review of the  
18 Commissioner's final decision. Dkt. No. 1.

## 19 II. JURISDICTION

20 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. §§  
21 405(g) and 1383(c)(3) (2005).

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24 <sup>1</sup>Plaintiff's application stated that she had not worked since December 1998, except for  
25 two temporary attempts at work between May and October 2000. AR 69.

26 <sup>2</sup>Plaintiff also alleged difficulty sleeping and migraine headaches in her Reconsideration  
Disability Report. AR 108.

## 01 III. STANDARD OF REVIEW

02 The court may set aside the Commissioner's denial of social security benefits when the  
03 ALJ's findings are based on legal error or not supported by substantial evidence in the record  
04 as a whole. *See* 42 U.S.C. 405(g); *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993); *Smolen*  
05 *v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996). Substantial evidence is defined as more than a  
06 mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind  
07 might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750  
08 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in  
09 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
10 Cir. 1995). Where the evidence is susceptible to more than one rational interpretation, it is the  
11 Commissioner's conclusion that must be upheld. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th  
12 Cir. 2002).

## 13 IV. EVALUATING DISABILITY

14 As claimant, Ms. Rapisardo bears the burden of proving that she is disabled within the  
15 meaning of the Social Security Act. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999).  
16 Disability is defined as the "inability to engage in any substantial gainful activity by reason of  
17 any medically determinable physical or mental impairment, which can be expected to result in  
18 death, or which has lasted or can be expected to last for a continuous period of not less than  
19 twelve months[.]" 42 U.S.C. §§ 423 (d)(1)(A), 1382c(a)(3)(A). A claimant is disabled if her  
20 impairments are of such severity that she is not only unable to do her previous work, and  
21 cannot, considering her age, education, and work experience, engage in any other substantial  
22 gainful activity existing in the national economy. *See* 42 U.S.C. §§ 423(d)(2)(A),  
23 1382c(a)(3)(B); *See also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999). The  
24 Social Security regulations set out a five-step sequential-evaluation process for determining  
25 whether a claimant is disabled within the meaning of the Social Security Act. *See* 20 C.F.R. §§  
26 404.1520, 416.920. At step one, the claimant must establish that she is not engaging in any

01 substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b). If the claimant establishes  
02 that she has not engaged in any substantial gainful activity, the Commissioner proceeds to step  
03 two. At step two, the claimant must establish that she has one or more medically-severe  
04 impairments or combination of impairments that limit her physical or mental ability to do basic  
05 work activities. If the claimant does not have such impairments, she is not disabled. 20 C.F.R.  
06 §§ 404.1520(c), 416.920(c). If the claimant does have a severe impairment, the Commissioner  
07 moves to step three to determine whether the impairment meets or equals any of the listed  
08 impairments described in the regulations. 20 C.F.R. §§ 404.1520(d), 416.920(d). A claimant  
09 who meets or equals one of the listings for the required twelve-month duration requirement is  
10 disabled. *Id.*

11 When the claimant's impairment neither meets nor equals one of the impairments listed  
12 in the regulations, the Commissioner must proceed to step four and evaluate the claimant's  
13 residual functional capacity ("RFC"). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the  
14 Commissioner evaluates the physical and mental demands of the claimant's past relevant work  
15 to determine whether the claimant can still perform that work. *Id.* If the claimant is not able to  
16 perform her past relevant work, the burden shifts to the Commissioner at step five to show  
17 that the claimant can perform some other work that exists in significant numbers in the national  
18 economy, taking into consideration the claimant's RFC, age, education, and work experience.  
19 20 C.F.R. §§ 404.1520(f), 416.920(f); *Tackett*, 180 F.3d at 1100. If the Commissioner finds  
20 the claimant is unable to perform other work, then the claimant is found disabled and benefits  
21 may be awarded.

## 22 V. DECISION BELOW

23 On June 19, 2003, the ALJ issued a decision denying plaintiff's request for benefits,  
24 which found:

25 \* \* \*

26 3. The claimant has a depressive disorder; an anxiety disorder with panic

01 attacks; a personality disorder; and a substance abuse disorder. These  
02 impairments are severe, and the combination of the claimant's  
03 impairments meets the criteria of the listed impairments described in  
sections 12.04, 12.06, 12.08 and 12.09 of 20 C.F.R., Part 404, Subpart  
P, Appendix 1.

- 04 4. The claimant is disabled due to the combination of her psychiatric  
05 disorders and substance abuse disorder.
- 06 5. The claimant's statements concerning her impairments and their impact  
07 on her ability to work are not entirely credible in light of information  
08 contained in the medical reports and other evidence in the record.
- 09 6. Without consideration of the effects of the claimant's substance abuse,  
10 the claimant's impairments do not meet or equal the criteria of any  
11 listed impairment described at Appendix 1 of the regulations.
- 12 7. Without consideration of the effects of the claimant's substance abuse,  
13 and upon her compliance with treatment, the claimant retains a residual  
functional capacity to perform sedentary work. She can sit 6 hours in  
14 an 8-hour workday and stand/walk 4 hours in a workday. She can  
15 occasionally climb ramps and stairs, and balance, but she cannot climb  
ropes, ladders, or scaffolds. She should not be exposed to hazards and  
16 heights. She should have limited contact with the public and co-  
workers, and can perform detailed but not complex work tasks.
- 17 8. The limitations imposed by the claimant's residual functional capacity  
18 prevent her from performing any of her past relevant work.

19 \* \* \*

- 20 11. Although the claimant is unable to perform a full range of sedentary  
21 work, she is capable of performing other occupations such as entry-  
22 level clerk (23,000 jobs locally, 59,000-62,000 jobs in the state, 2  
million jobs in the nation). A finding of "not disabled" is therefore  
23 reached within a framework of the Medical-Vocational Guidelines at  
Appendix 2 of the regulations.
- 24 12. The medical evidence establishes that the claimant would not be  
disabled if she stopped her substance abuse. Therefore, substance  
25 abuse is a contributing factor material to the determination of disability  
and, in accordance with P.L. 104-121, the claimant is ineligible for  
26 disability benefits under the Social Security Act.
13. The claimant has not been under a disability, as defined in the Social  
Security Act, at any time through the date of this decision.

AR 28-29.

01 VI. ISSUES ON APPEAL

02 Plaintiff's complaint raises three primary assertions of error:

- 03 1 Did the ALJ erroneously reject the plaintiff's testimony regarding the  
04 extent of her impairments?
- 05 2. Did the ALJ erroneously reject Dr. White's medical opinion?
- 06 3. Did the ALJ err by accepting vocational expert testimony that deviated  
07 from the Dictionary of Occupational Titles job descriptions without  
adequately explaining that deviation?

08 Additionally, if the Court finds that the ALJ committed reversible error, the parties  
09 disagree as to whether the case should be remanded for further administrative proceedings, or  
10 for an immediate award of benefits.

11 VII. DISCUSSION

- 12 A. The ALJ improperly rejected the plaintiff's testimony regarding the  
13 extent of her impairments.

14 Plaintiff argues that the ALJ failed to provide clear and convincing reasons for  
15 rejecting her testimony and that, as a result, her testimony should be "credited as true." Dkt.  
16 No. 12. According to the Commissioner's regulations, a determination of whether to accept a  
17 claimant's subjective symptom testimony requires a two-step analysis. 20 C.F.R. §§  
18 404.1529, 416.929; *Smolen*, 80 F.3d at 1281; SSR 96-7p. First, the ALJ must determine  
19 whether there is a medically determinable impairment that could reasonably be expected to  
20 cause the claimant's symptoms. *Id.* at 9(a) and (b); *Smolen*, 80 F.3d at 1281-2; SSR 96-7p, at  
21 \*2. Once a claimant produces medical evidence of an underlying impairment, the ALJ may  
22 not discredit the claimant's testimony as to the severity of symptoms merely because they are  
23 unsupported by objective medical evidence. *Smolen*, 80 F.3d at 1282; *Reddick v. Chater*, 157  
24 F.3d 715, 722 (9th Cir. 1998) (internal citations omitted)). Absent affirmative evidence  
25 showing that the claimant is malingering, the ALJ must provide "clear and convincing"  
26 reasons for rejecting the claimant's testimony. *Smolen*, 80 F.3d at 1284; *Reddick*, 157 F.3d at  
722.

01 When evaluating a claimant's credibility, the ALJ must specifically identify what  
02 testimony is not credible and what evidence undermines the claimant's complaints; general  
03 findings are insufficient. *Smolen*, 80 F.3d at 1284; *Reddick*, 157 F.3d at 722. The ALJ may  
04 consider "ordinary techniques of credibility evaluation" including the claimant's reputation  
05 for truthfulness, inconsistencies in her testimony, or between her testimony and conduct, daily  
06 activities, work record, and testimony from physicians and third parties concerning the nature,  
07 severity, and effect of the symptoms of which she complains. *Smolen*, 80 F.3d at 1284; *see*  
08 *also Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997) (internal citations  
09 omitted).

10 The ALJ found that plaintiff suffered from depressive disorder, an anxiety disorder  
11 with panic attacks, a personality disorder, and a substance-abuse disorder. AR 28. These  
12 severe mental impairments reasonably could have been found to cause the anxiety-related  
13 symptoms alleged by plaintiff. Indeed, plaintiff complained of difficulty functioning outside  
14 her home and in social situations. AR 522-25, 532-39. Nevertheless, the ALJ determined  
15 that plaintiff's credibility was "very low" in light of the evidence available in the record. AR  
16 25, 28. Because there were no allegations of malingering, the ALJ was required to provide  
17 clear and convincing reasons for rejecting plaintiff's testimony.

18 The ALJ did not provide clear and convincing reasons for rejecting plaintiff's  
19 subjective symptom testimony. The chief reason offered by the ALJ for disbelieving  
20 plaintiff's testimony was that he found her daily activities to be inconsistent with the severity  
21 of her alleged symptoms. AR 22, 25. For instance, the ALJ noted that plaintiff was capable  
22 of getting to her daily methadone and mental-therapy sessions, performing light housework,  
23 and having "occasional" contact with a former boyfriend. AR 22, 25, 473, 510. He also  
24 noted that plaintiff was able to take care of a pet cat and that she fed squirrels and birds  
25 around her home and ran some errands. AR 25, 511. According to the ALJ, "[t]hese daily  
26 activities suggest that the claimant is not as physically limited as she has alleged." AR 25.

01        These observations, however, do not provide an appropriate foundation to reject the  
02 plaintiff's symptom testimony. An ALJ may reject a claimant's symptom testimony when  
03 evidence suggests the claimant can spend a "substantial part of her day performing household  
04 chores or other activities that are transferable to a work setting." *Smolen*, 80 F.3d at 1284 n.7  
05 (internal citations omitted). A finding of disability, however, does "not require that claimants  
06 be utterly incapacitated to be eligible for benefits[.]" *Id.* Here, evidence suggesting plaintiff is  
07 capable of feeding squirrels and performing light household chores does not contradict her  
08 claims that she is depressed and suffers from agoraphobic anxiety. Similarly, the fact that  
09 plaintiff has "occasional" contact with a former boyfriend does not impeach her credibility.  
10 While it is true that plaintiff gets to methadone treatment on a daily basis, she does so by way  
11 of a cab provided by DSHS. AR 532. Indeed, the record demonstrates that her anxiety-  
12 related symptoms prevent her going to the treatment facility using the bus. AR 533.

13        The ALJ also impugned plaintiff's credibility based on her presentation and demeanor  
14 at the hearing. AR 26. He noted that she was neatly groomed, "logical, directed, and fully  
15 oriented." *Id.* AR 514. He also observed that she did not appear to be in pain or discomfort,  
16 despite some occasional tears. *Id.* Yet, as even the ALJ acknowledged, these observations  
17 are based on a "short-lived, one time situation and cannot be considered conclusive[.]" *Id.*  
18 Accordingly, these observations cannot rise to the level of "clear and convincing" reasons for  
19 rejecting the plaintiff's testimony.

20        Underlying the ALJ's determination that plaintiff's "credibility [is] nil" was that she  
21 was a long-time drug addict who apparently was able to function and work while she was still  
22 using drugs. AR 25-26. Yet, her last gainful employment was approximately seven years  
23 ago, and it appears plaintiff suffered symptoms of panic attacks during that time. AR 534.  
24 Moreover, it is reasonable to assume her condition has worsened since then. Indeed, the  
25 medical expert testified that this appeared to be the case. AR 542. While it appears plaintiff  
26 was able to panhandle and "boost" in order to obtain money for drugs, being able to perform



01 these activities while under the influence of heavy drugs is not inconsistent with the  
02 symptoms she currently describes. AR 529-30. The ALJ failed to provide clear and  
03 convincing reasons for discounting the plaintiff's testimony when looking at the record as a  
04 whole.

05 B. The ALJ erroneously rejected Dr. White's medical opinion.

06 The opinions of examining physicians are to be given more weight than non-examining  
07 physicians and, when uncontradicted, may not be rejected without clear and convincing  
08 evidence. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). An ALJ may reject the  
09 controverted opinions of an examining physician only when he provides specific and  
10 legitimate reasons that are supported by the record. *Id.* at 830-31.

11 Dr. White is a clinical psychologist and neuropsychologist who examined plaintiff,  
12 reviewed her files, and interviewed her chemical dependency counselors and psychotherapists  
13 in November, 2002.<sup>3</sup> AR 465-77. He observed that the plaintiff's mental status functioning  
14 was intact and that she had recent and remote memory intact. However, he also opined that  
15 plaintiff's severe depression, anxiety disorder, agoraphobia, and panic disorder prevented her  
16 from working full-time. AR 476. He also opined that, absent involvement in a systematic  
17 recovery program, plaintiff would not be able to work in the future. *Id.* He assessed her GAF  
18 ("Global Assessment of Functioning") at 40, and also administered the Beck Depression  
19 Inventory test, and scored plaintiff at 61, "which is suggestive of severe depression." AR  
20 473. The ALJ rejected Dr. White's opinions. AR 21-22. He asserted that they were not  
21 based on objective observations, were overly dependent on plaintiff's non-credible reports,  
22 and were thus "unsupported and not convincing." AR 21-22. He then categorically  
23 discounted any other medical source who may have relied on Dr. White's report, without  
24 specifically identifying those reports. AR 22.

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26 <sup>3</sup>The report is actually dated January 6, 2003. AR 465.

01 Dr. White's diagnoses were generally consistent with every other diagnosis in the  
02 record. AR 465-67. However, there were conflicting medical opinions regarding the extent  
03 to which those diagnoses limited plaintiff's ability to work. AR 476, 237, 238-46, 249-50.  
04 Hence, the ALJ was obliged to provide specific and legitimate reasons for rejecting Dr.  
05 White's opinions. He failed to do so.

06 The chief reason given by the ALJ to reject Dr. White's opinions was that he believed  
07 it relied too heavily on plaintiff's "case history" and self reporting, which, as discussed above,  
08 he did not find credible. Dr. White's opinions undoubtedly rely heavily on plaintiff's self-  
09 described symptoms. Indeed, it is hard to imagine a psychological report that does not.  
10 However, because the ALJ's evaluation of plaintiff's credibility was legally flawed, this  
11 cannot serve as a "specific and legitimate" reason for disregarding Dr. White's opinion.

12 The ALJ also indicated that plaintiff's "history and symptoms are inconsistent and  
13 Dr. White's objective observations do not support his conclusions." AR 21. For example, the  
14 ALJ cited the fact that plaintiff performed adequately on memory tests and basic questions  
15 requiring the use of practical judgment and reasoning. AR 22. According to the ALJ, these  
16 facts undermined her self-reported symptoms and undermined Dr. White's diagnoses and  
17 opinions regarding her ability to function in the workplace. AR 21-22. However, as Dr.  
18 White noted, the plaintiff's mental status and recent and remote memory were intact. The  
19 ALJ did not address how keeping an appointment with a doctor or having a lucid conversation  
20 with that doctor would be inconsistent with his diagnoses of severe depression, generalized  
21 anxiety, and panic disorder. The ALJ also failed to indicate how these facts were inconsistent  
22 with the doctor's opinion that the plaintiff's mental impairments limited her ability to  
23 function in the competitive workplace. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 1, §§ 12.04,  
24 12.06 (indicating diagnostic requirements and symptoms for affective and anxiety-related  
25 disorders).

26 The ALJ indicated that Dr. White's opinions relied upon case history from non-

01 acceptable medical sources. AR 21. The regulations define “acceptable medical sources” as  
 02 licensed physicians, licensed or certified psychologists, licensed optometrists, licensed  
 03 podiatrists, and qualified speech-language pathologists. 20 C.F.R. §§ 416.913(a),  
 04 404.15139(a). Of the five sets of medical records analyzed in Dr. White’s report, only one  
 05 was from a non-acceptable source.<sup>4</sup> Because the ALJ has the obligation to develop the  
 06 medical record, *Smolen*, 80 F.3d at 1288, if he was using this as a justification for rejecting  
 07 Dr. White’s opinion, the ALJ should not have rejected summaries from four “acceptable  
 08 medical sources” in order to prevent one non-medically acceptable source from being  
 09 considered. He should have developed the medical record in more detail. By identifying  
 10 which evidence was from an unacceptable source and why, it was not acceptable.

11 In this case, as mentioned above, the ALJ not only decided to reject Dr. White’s  
 12 opinions, he took the extraordinary step of categorically discounting any other medical source  
 13 that made reference to Dr. White’s opinion. AR 22. He did not specifically identify which  
 14 reports this included. On remand, the ALJ will give proper consideration and evaluation to  
 15 Dr. White’s report. The ALJ will also review all other medical reports that make reference to  
 16 Dr. White’s report and reevaluate those reports as well.

17 C. The ALJ erred by accepting vocational expert testimony that deviated  
 18 from the Dictionary of Occupational Titles job descriptions without  
 19 adequately explaining that deviation.

20 After a claimant has demonstrated that she has a severe impairment that prevents her  
 21 from doing her past relevant work, she has made a *prima facie* showing of disability. *Tackett*,  
 22 180 F.3d at 1100-01. The burden then shifts to the Commissioner at step five to demonstrate

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23 <sup>4</sup>The intake summary by Michael Kelly, MHP, is the only non-physician report explicitly  
 24 relied upon by Dr. White’s report. AR 465–67. According to the Dictionary of Initials and  
 25 Acronyms Used by Counselors, “MHPs are qualified mental health providers who have been  
 26 designated by an agency or hospital to meet contractual requirements with the county to  
 perform duties in accordance with Washington State law.” *See*  
<http://www.counselingseattle.com/acronyms/i-m.htm#-M->.

01 that, in light of the claimant's RFC, age, education and work experience, she can perform other  
02 types of work that exist in "significant numbers" in the national economy. *Id.*; 20 C.F.R. §§  
03 404.1560(b)(3), 416.960(b)(3). When the Medical-Vocational Guidelines do not accurately  
04 reflect the claimant's non-exertional impairments, the Commissioner must use them as a  
05 framework in conjunction with a vocational expert ("VE"). *Tackett*, 180 F.3d at 1101; *see*  
06 *also* SSR 85-15, at \*4.

07 The Dictionary of Occupational Titles ("DOT") classifies jobs by their exertional and  
08 skill requirements and serves as the Commissioner's "primary source of reliable job  
09 information." *Terry v. Sullivan*, 903 F.2d 1273, 1276 (9th Cir. 1990). The DOT, however, is  
10 not the only source of acceptable evidence regarding job classifications. *Johnson v. Shalala*,  
11 60 F.3d 1428, 1435 (9th Cir. 1995). Rather, it raises a rebuttable presumption that the job  
12 classification is correct. *Id.* The Commissioner may rebut the presumption and deviate from  
13 the DOT when she relies upon persuasive testimony from a VE that justifies the deviation.  
14 *Id.* at 1435-36. A VE who identifies jobs based upon an accurate hypothetical and who  
15 explains why they deviate from the DOT's classifications satisfies this burden. *Id.* at 1436.

16 Here, the ALJ concluded that plaintiff was "unable to perform a full range of  
17 sedentary work, [but was] capable of performing other occupations such as entry-level office  
18 clerk[.]" AR 29. The DOT classifies this "entry-level office clerk" position as "light" in skill  
19 level. AR 497. The VE explained that plaintiff's prior work experience as a librarian  
20 assistant and drug-store clerk provided some transferable skills that could be used in the  
21 entry-level office-clerk position. AR 546. He also explained that the clerk position would  
22 provide her the option of "varying the sitting and standing." *Id.* Although his explanation  
23 could have been more articulate, the VE adequately explained why some of plaintiff's skills  
24 were transferable to the clerk position.

25 In light of the fact that the ALJ found plaintiff able to perform sedentary work only,  
26 he should have discussed the discrepancy between the DOT's classification of the position as

01 “light” in exertional level and the VE’s testimony. SSR 00-4p, at \*4. Indeed, Social Security  
02 Ruling 00-4p states that ALJ’s “must explain the resolution of the conflict” and “explain in  
03 the . . . decision how he or she resolved it.” *Id.* Although social security rulings do not carry  
04 “the force of law,” they are binding on ALJs, and courts defer to them to the extent they are  
05 consistent with the applicable social security statutes and regulations. *Holohan v. Massanari*,  
06 246 F.3d 1195, 1203 n.1 (9th Cir. 2001) (internal citations omitted). Here, the ALJ failed to  
07 explain the deviation in his decision and should do so upon remand.

08 The Commissioner argues that any error here was harmless and does not require  
09 remand. Dkt. No. 14; *See, e.g., Batson v. Commissioner of Social Security*, 359 F.3d 1190  
10 (9th Cir. 2004) (applying the harmless-error standard). However, because the entry-level  
11 clerk position was the only position the VE identified, if it was in error, plaintiff would have  
12 been found disabled. Thus, the error is not harmless.

13 D. This Case Should Be Remanded for Further Administrative  
14 Proceedings.

15 Having determined that the ALJ erred and that a remand is appropriate, the Court  
16 must determine whether the case should be remanded for an immediate award of benefits, or  
17 for further administrative proceedings. The parties disagree as to what action is appropriate  
18 in this case.

19 The court has discretion to remand for further proceedings or to award benefits. *See*  
20 *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The court may direct an award of  
21 benefits where “the record has been fully developed and further administrative proceedings  
22 would serve no useful purpose.” *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir.  
23 2002).

24 Such a circumstance arises when: (1) the ALJ has failed to provide legally  
25 sufficient reasons for rejecting the claimant’s evidence; (2) there are no  
26 outstanding issues that must be resolved before a determination of disability can  
be made; and (3) it is clear from the record that the ALJ would be required to  
find the claimant disabled if he considered the claimant’s evidence.


01 *Id.* at 1076-77.

02 A remand for further administrative proceedings is appropriate. As discussed above,  
03 the ALJ committed error in several instances. Nevertheless, a finding of disability is not  
04 necessarily the pre-determined decision as a result of these errors. Additionally, the ALJ  
05 must resolve whether plaintiff actually can perform the entry-level office-clerk position  
06 identified by the VE. Finally, uncertainty remains as to when plaintiff stopped her drug and  
07 alcohol use, and whether such use would still preclude a finding of disability here. Because  
08 of these remaining ambiguities, the Court need not credit plaintiff's testimony as true and  
09 declines to do so. *See Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003) (explaining  
10 that the "credit as true" doctrine is discretionary).

11 VIII. CONCLUSION

12 For the reasons discussed above, the Court recommends that this case be reversed and  
13 remanded for further administrative proceedings not inconsistent with this Report and  
14 Recommendation. A proposed order accompanies this Report and Recommendation.

15 DATED this 19th day of December, 2005.

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18 JAMES P. DONOHUE  
19 United States Magistrate Judge  
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